THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:	Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent	)
IN RE:	Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	) **REPLY IN SUPPORT OF MOTION TO SANCTION JOINT APPLICANTS AND TO COMPEL PRODUCTION OF WRONGFULLY WITHHELD DOCUMENTS IN JOINT APPLICANTS' PRIVILEGE LOG**
IN RE:	Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans	)

INTRODUCTION

The response[1] of South Carolina Electric & Gas Company ("SCE&G") to the South Carolina Office of Regulatory Staff's ("ORS's") Motion to Sanction Joint Applicants and to

[1] Dominion Energy has filed a separate response to ORS's Motion to Sanction and Compel in which Dominion states that it continues to defer to SCE&G for purposes of discovery and privilege issues. This reply is focused upon the response of SCE&G.

Compel Production of Wrongfully Withheld Documents in Joint Applicants' Privilege Log ("Motion to Sanction and Compel") reinforces the conclusion that sanctions are needed to address SCE&G's continued non-compliance with the Order of this Commission. SCE&G is not being transparent with ORS or this Commission.

SCE&G continues a blatant pattern of deception and delay, making the demonstrably false – and shocking – statement that they are compliant with this Commission's June 21 order to produce the Bechtel documents (the "Order"). In its response brief, SCE&G is once again misleading the Commission about what documents are in its possession, what documents it has produced, and what documents it intends to produce. SCE&G also continues its old refrain that privilege somehow attaches to the Bechtel documents, despite a full and completed ***waiver*** of that privilege, a waiver that SCE&G previously argued had "mooted" ORS's prior motion to compel the Bechtel materials.

ORS seeks an order drawing adverse inferences and/or establishing designated facts from SCE&G's failure to comply with the Commission's Order that (i) SCE&G engaged in a deliberate scheme to conceal information with respect to the Bechtel assessment of the completion dates and the documents and the facts and conclusions contained in them; and (ii) the Bechtel documents support the conclusion that SCE&G should not be allowed to include any costs **incurred after at least October 22, 2015**,[2] related to the V.C. Summer Project in the rate base for the setting of future rates.

[2] Discovery is ongoing, and ORS has not finalized its position regarding what it would recommend to this Commission as prudently incurred abandonment costs. It is ORS's position that at a minimum, any cost incurred after October 22, 2015 should be disallowed because of SCE&G's acts with regard to the Bechtel materials.

With respect to ORS's additional concerns regarding SCE&G's failure to disclose documents responsive to AIR 5-26, ORS welcomes – with cautious skepticism – SCE&G's statement that it has "re-evaluated" the documents on the Privilege Log and will be making a supplemental production of these documents as well as providing a revised Privilege Log. Having been down this road once before with prior promises of SCE&G that were not followed through on in good faith, ORS respectfully argues this new "concession" does not relieve the need for an order to compel. This is particularly the case given that SCE&G still appears to assert that privilege attaches to certain of the documents responsive to Request 5-26 and that SCE&G effectively concedes ORS's primary point that these responsive documents primarily concern business and prudency-related discussions that relate directly to the merits of the questions before the Commission.

DISCUSSION

I. SCE&G has failed to comply with the Commission's Order regarding the production of the Bechtel-related documents, and sanctions are warranted.

A. SCE&G waived privilege as to the Bechtel-related documents.

Despite SCE&G's promise to produce documents to ORS that show the full account of Bechtel's engagement and assessment, and despite SCE&G's direct waiver of claims of privilege,[3] it is abundantly evident from the response that SCE&G continues to hide information regarding Bechtel. These actions amount to nothing more than an attempt to conceal what

[3] ORS reiterates its position that claims of privilege ***never*** properly applied to the Bechtel-related documents, for all the reasons already set out in ORS's initial Motion to Compel filed on May 23, 2018, at pages 4-11, which is fully incorporated herein by reference. (See Exhibit A to Motion to Sanction and Compel – ORS Motion to Compel, at 4-11). This Commission found no need to reach those arguments, of course, given SCE&G's agreement to produce the documents.

SCE&G said it would provide and, more importantly, what the Commission ordered SCE&G to provide. Waiver of privilege, complete and total, could not be more evident under these facts.

In SCE&G's Response to ORS's Motion to Compel filed on June 11, 2018, SCE&G indisputably consented to disclose any and all documents and communications related to the engagement of Bechtel and the Bechtel Reports. Specifically, SCE&G voluntarily and unambiguously proffered that

> SCE&G, though its parent company SCANA, has decided to produce documents that provide ***the full account of the Bechtel engagement and assessment***, ***including the communications related to the engagement of Bechtel and the ensuing Bechtel Report***.

(See Exhibit B to Motion to Sanction and Compel - Joint Applicants' Response to Motion to Compel, at 5 (emphasis added)). SCE&G further stated that "ORS has sought the production of the Bechtel Report and 'its drafts, alternative reports, working papers, references, responses, and other related documents, including ***all communications relating to the assessment of the Report***' . . . As noted, ***SCE&G will produce these materials***." (*Id*. at 6 (emphasis added)). "SCE&G has determined," the prior response brief explained, "that it is incumbent upon it to ***provide the Commission with a full account of Bechtel's involvement*** with the Project." (*Id*. at 5 (emphasis added)). Indeed, SCE&G went so far as to claim that "SCE&G's decision to disclose the privileged Bechtel Materials ***render[ed] the remainder of ORS' motion moot***." (*Id*. at 5 (emphasis added)).

Not only did SCE&G state it was waiving the privilege in its response to the motion to compel, it waived any remaining privilege by attaching handwritten notes of two of SCE&G's top executives concerning communications between those executives and SCE&G's counsel George Wenick, for the purpose of selectively painting SCE&G's version of the events

surrounding the Bechtel engagement. SCE&G has unquestionably waived any privilege over the Bechtel-related documents. For SCE&G to continue to assert privilege in its Response is indicative of its intent to wind down the clock and delay producing discovery until the point where the information will no longer be useful.

SCE&G's dubious argument that it has not waived the privilege for documents on which it has an "independent basis" for privilege, Resp. at 2, is nothing more than an attempt to sidestep the law of South Carolina, which makes clear that waiver means waiver. As ORS pointed out in its Motion to Sanction and Compel, voluntary disclosure waives the attorney-client privilege not only as to the specific communication disclosed, but also to "***all communications between the same attorney and the same client on the same subject***." *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct. App. 1984). As ORS has previously stressed, the reason behind this rule is "one of basic fairness," as a party "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final." *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161-62 (D.S.C. 1974).

SCE&G's related contention that its waiver was not complete because the Order contained a reference to the production of a "previously promised privilege log" is unavailing. *See* Resp. at 9. The reference to the "privilege log" in the Commission's Order merely echoed language in ORS's own briefing on the initial motion to compel, which addressed numerous discovery deficiencies in addition to those relevant to the Bechtel requests, and sought production of all the Bechtel documents as well as a privilege log for any documents that SCE&G continued (for whatever reason) to withhold. The Order's isolated reference to a "privilege log" is not dispositive as to whether or not SCE&G has completed a waiver of the privilege. SCE&G's

statements and actions are. And here, where SCE&G has (i) stated it would produce "the Bechtel Report and 'its drafts, alternative reports, working papers, responses, and other related documents, including ***all communications relating to the assessment of the Report***,"[4] and (ii) begun that production, waiver is completed, although the resulting and legally required production is not.

Moreover, as ORS has repeatedly explained, SCE&G argued in response to the first motion to compel that this waiver obviated the need for the Commission to address ORS's numerous arguments that the Bechtel documents were not privileged. SCE&G avoided the determination of those questions only by its agreed waiver. For SCE&G now to argue that waiver was somehow partial and incomplete demonstrates the use of discovery tactics in this case inconsistent with SCE&G's obligation to proceed in good faith. From the perspective of ORS, it is furthermore deeply frustrating for SCE&G to promise to disclose materials – and thereby avoid a ruling from this Commission on privilege – only to then renege on that promise. Under tight deadlines and circumstances that SCE&G itself created, this behavior is inexcusable, and left ORS with no recourse but to file this Motion.

B. The paucity of Bechtel documents produced to date demonstrates non-compliance with the Order.

Contrary to SCE&G's suggestion, this is not simply a dispute about the scope of waiver. What is perhaps more remarkable than SCE&G's continued claims of privilege over the Bechtel documents is its suggestion that it has "complied" with the obligation to produce documents that

[4] SCE&G's promise to produce "all communications related to the assessment of the Report" further undermines SCE&G's claim that post-abandonment communications are privileged. *See* Resp. at 11. Such communications are plainly relevant to the assessment of the Report, and fall within the scope of the waiver.

provide "the full account of the Bechtel engagement," including the Report and "its drafts, alternative reports, working papers, references, responses, and other related documents, including all communications relating to the assessment of the Report." (*See* Exhibit B to Motion to Sanction and Compel, at 5; Order at 2). Not so. ORS does not have the "full account" that SCE&G has promised and that would come only with a full disclosure.

To date, as best as ORS can determine, SCE&G has produced at most 7 total documents in response to the Bechtel-related requests.[5] This cannot be the "full account" of a million-dollar engagement spanning ***at least*** 7 months that produced draft as well as revised reports and involved ***at least*** 5 persons at SCE&G.

The few documents ORS has received are as follows. In its June 11 Response to ORS's Motion to Compel, SCE&G attached as exhibits ***three*** handwritten pages of documents and the Bechtel Report. On August 10, 2018, SCE&G further produced ***four*** additional Bechtel documents. These 7 documents are the entire extent of SCE&G's original Bechtel production,[6] not including, of course, those documents SCE&G has withheld from production on the basis of privilege. But even including the logged and withheld documents, the number of total Bechtel documents that SCE&G has acknowledged the existence of is still shockingly and unrealistically low.

[5] As of July 6, 2018, ORS had received two pages of handwritten notes responsive to Request Number 2-5 and only one page of handwritten notes responsive to Request Number 6-6. On August 10, 2018, ORS received four documents responsive to Request Number 6-7. To date, ORS has received no documents in response to Requests Number 6-9. Of note, SCE&G has not logged any documents responsive to Request Number 2-5 on either its initial privilege log or its updated privilege log.

[6] ORS also received from SCE&G a duplicate copy of a limited number of Bechtel-related materials that ORS had already received from Santee Cooper.

These few documents cannot be the total number of Bechtel-related documents that this Commission has ordered produced.

C. SCE&G has conceded it is still reviewing and determining what Bechtel documents can be produced, and ORS is aware of documents SCE&G has failed either to produce or log.

SCE&G's claim that it has handed over all Bechtel-related documents is demonstrably disingenuous for two additional reasons beyond the paucity of documents produced to date. First, SCE&G has itself ***conceded*** it is still reviewing Bechtel documents, determining what to log and what to produce. Second, ORS is aware of Bechtel-related documents that have been neither logged nor produced. Even assuming *arguendo* that SCE&G may still properly claim privilege applies to some Bechtel documents, the task of producing (or logging) Bechtel documents was to have been completed on July 6, 2018, as the Order unquestionably requires.

In SCE&G's own words, however, as of July 20, 2018 – ***fourteen (14) days after the Commission-ordered deadline to produce all Bechtel-related documents had passed*** – SCE&G was still in the process of reviewing and sorting through documents to see what needed to be produced or logged on its Privilege Log. This admission came in response to ORS's deficiency letter. In its response letter, SCE&G conceded that "SCE&G is ***actively involved in reviewing Bechtel-related documents***, to determine what material may be disclosed. ***Given the scope of the documents, however, SCE&G requires additional time to make these determinations and produce*** any responsive, non-privileged documents related to Bechtel." (Exhibit D to Motion to Sanction and Compel – Burgess Letter to Richardson, at 4 (emphasis added)). Thus, without question, at least fourteen days after the Commission's deadline to produce had passed, SCE&G expressly admitted that it was still sorting through documents and picking and choosing what to hand over.

Still lacking Bechtel documents nearly two weeks later, ORS raised this issue with SCE&G in a conference call on Thursday, August 2, 2018. In that call ORS explained that it would be forced to file a motion for sanctions if the documents were not forthcoming. SCE&G responded that given the scope of the Bechtel documents and the review required, it could not begin a production for at least another 10 to 14 days. ORS replied that such additional delay was unacceptable given that SCE&G had then had nearly six weeks since the Commission entered its Order, but ORS allowed that if documents were forthcoming by Wednesday of the following week, August 8, that would be acceptable. No additional documents were produced by August 8, however, nor were any further communications made from SCE&G to ORS about when productions would occur. ORS was therefore forced to file this Motion for Sanctions.

To further illustrate SCE&G's bad faith, ORS is aware of numerous Bechtel-related documents that have yet to be produced or logged. By way of example, in its Response to ORS's Motion to Compel, SCE&G discusses at least three separate Bechtel Reports to help paint its selective picture: the presentation on October 22, 2015, and the Project Assessment Report and Schedule Assessment Report from February 2016; and we also know of a draft report received by George Wenick and referenced in an email from Wenick dated November 18, 2015. (Exhibit B to Motion to Sanction and Compel, at 18 – 23). Yet, to date, SCE&G has never produced the draft Report referenced in Wenick's November 18, 2015 email, or the Schedule Assessment Report. There are also numerous communications and notes that had to have occurred but have also been unilaterally withheld to hide the full story promised by SCE&G to ORS and to the Commission.

Additional examples of documents that have neither been logged as privileged nor produced are as follows:

- DOJ_00053916-917 (Responsive to 6-8): Several emails dated July 30, 2015, between Michael Crosby and Steve Byrne on getting Bechtel agreement signed with attorney approval (Wenick, Bynum, Pelcher) (dated July 30, 2015).

- SCPSA-House_00000516-517 (Responsive to 6-8): "Bechtel PO Update: Martyn Daw [Bechtel] and George Wenick got all PSA issues situated yesterday…" (dated August 4, 2015).

- DOJ_00025029 (Responsive to 6-6): Kevin Marsh email to Lonnie Carter about Bechtel assessment challenges, dated August. 25, 2015.

- SCPSA-House_00000518 (Responsive to 6-6): Multiple emails in chain dated September 9, 2015, from Lonnie Carter CC'd to Kevin Marsh with the subject line "RE: Information for Bechtel Review."

- SCPSA-House_00000522 (Responsive to 6-6): Email dated September 10, 2015, from Lonnie Carter CC'd to Kevin Marsh with the subject line "Re: Bechtel Access to change orders."

- SCPSA-House_00000525 (Responsive to 6-6): Email from Lonnie Carter CC'd to Kevin Marsh dated September 21, 2015, saying "Bechtel is in the best position to inform us about where things really are."

- SCPSA-House_00000440 (Responsive to 6-8): Email from Al Bynum to Michael Crosby saying "remember we hired Bechtel on a limited basis, through George [Wenick], and with the alleged cooperation of the consortium."

- DOJ_00171650 (Responsive to 6-9): Email from Michael Crosby to Steve Byrne dated January 20, 2016, asking if he knows the status of the release of the final Bechtel report.

- DOJ_00171642 (Responsive to 6-9): Email from Lonnie Carter to Kevin Marsh dated February 3, 2016, saying "the delay in getting the final Bechtel report is frustrating."

- SCPSA-House_00000495 (Responsive to 6-9) Email from Mike Baxley to Al Bynum alerting SCE&G that "We are moving forward with plans to release the report to the Cooperatives."

- DOJ_00123219 (Responsive to 6-9): Email from SCE&G's Jason Williams dated September 11, 2017, to Michael Crosby asking for the date that ORS "actually got to review the Bechtel report" and "Did they see it?"

As indicated above, SCE&G has failed to produce or even log documents in SCE&G's possession, evidencing SCE&G's bad faith and confirming sanctions are warranted.

D. Sanctions are appropriate to address SCE&G's pattern of noncompliance and continued attempts to conceal the story of the Bechtel engagement.

SCE&G's pattern of deception and attempts to hide the full Bechtel story are nothing new. As ORS noted in its Reply supporting its original Motion to Compel, ORS first made an inquiry on October 27, 2015, for any information about a possible Bechtel assessment but was told that nothing was available. ORS's 2015 inquiry was prompted by ORS's NND staff attending the regularly scheduled plan-of-the-day meeting on or about October 15, 2015, during which ORS noted the presence of a Bechtel representative. (The inquiry was not prompted by the examination of legal invoices, because Bechtel had performed other work at the site for years.)

After the October 2015 inquiry, ORS issued an information request to SCE&G asking whether a project consultant had been retained. SCE&G's response did not provide any reference to Bechtel's assessment or any version of the Bechtel Report. In addition, Santee Cooper's notes about the Bechtel Report acknowledge that SCE&G was not forthcoming. Last, SCE&G's quarterly reports under the BLRA required an update on the project schedule. S.C. Code Ann. § 58-33-277(A). No quarterly report references Bechtel's assessment or report.

Delay and obfuscation cannot be permitted to prevail over the orderly process of discovery. Sanctions are necessary where a party has engaged in "bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair v. Fairfield County*, 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008). That standard has been met under these facts.

II. Documents Responsive to Request 5-26.

SCE&G further continues its pattern of delay in its statements regarding documents responsive to Request 5-26. Although as indicated above ORS welcomes the concession of

SCE&G to produce certain of the documents listed on the privilege log, SCE&G continues to make promises regarding production that have been heard many times before. (*See* Exhibit B to ORS's Motion to Sanction Joint Applicants and to Compel Production of Wrongfully Withheld Documents in Joint Applicants' Privilege Log, at 5). ORS places little faith in such assurances, and an order from the Commission is needed to compel production of the documents responsive to Request 5-26.

A. SCE&G has produced only certain documents responsive to Request 5-26.

As an initial matter, SCE&G states that it has "claimed privilege with respect to only *some* of the documents responsive to Request 5-26, and ha[ve] produced others." Response at 20-21. As is the case with SCE&G's document production related to the Bechtel documents, SCE&G has produced only certain documents responsive to Request 5-26, continuing its pattern of "selective disclosure." Even assuming privilege applies to these documents, this "selective disclosure" of certain documents and protection of others related to the same subject matter is not permitted. *See Marshall*, 282 S.C. at 538, 320 S.E.2d at 47. Given SCE&G's prior conduct in selectively disclosing documents to paint its actions in the most favorable light, ORS not only has no confidence that SCE&G will produce any promised documents in the future, and fully expects any produced documents will fail to provide the full picture.

To date SCE&G has provided case studies and analyses addressing in full only 2 of the 5 different specified scenarios at the V.C. Summer Project. ORS believes it has received a partial response for two additional scenarios, and no documents at all addressing a third scenario.[7] SCE&G continues to cloak the full picture under a veil of privilege.

[7] This third scenario on which ORS has received no documents is described as "[c]ompleting Unit 2 and abandoning or delaying Unit 3 in the case that Santee Cooper did not pay its 45%

B. SCE&G concedes that documents responsive to Request 5-26 are business-related communications and studies at the heart of these proceedings.

By making no argument to the contrary in its Response, SCE&G has conceded that the logged documents responsive to Request 5-26 relate directly to the economic viability of the project and the prudency or business rationale of SCE&G's decision to abandon it—the very same determination that this Commission is being asked to make in these proceedings. It is therefore essential that ORS have the opportunity to review these documents, as they go directly to the heart of these proceedings and the task before this Commission. In light of the crucial importance of these documents, SCE&G bears the burden of showing that the ostensibly privileged documents were prepared for a predominantly legal purpose to merit the claim of privilege. *See, e.g.*, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 411 (D. Md. 2005) ("Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected."); *Nix v. Holbrook*, No. CIV.A. 5:13-02173-JM, 2015 WL 631155, at *6 (D.S.C. Feb. 13, 2015) (same). The Privilege Log fails to make the requisite showing thereto, and SCE&G has therefore failed to satisfy its burden to show that the documents are privileged.

C. The attorney-client privilege does not attach to the documents responsive to Request 5-26 because SCE&G has not demonstrated that SCE&G employees conducted investigations to assist counsel with providing primarily <u>legal</u> advice.

SCE&G states in its Response that the analyses and case studies that fall under the purview of Request 5-26 were prepared by SCANA/SCE&G employees at the behest of outside counsel, purportedly for the purpose of analyzing "different possible scenarios under which

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share of the construction and operating costs (referenced in paragraph 90 of the Merger Application)." The request adds that "[i]f no economic analysis was performed, please explain how SCE&G determined this option would not be feasible or beneficial to customers." Such information is plainly business-related and relevant to this Commission's determinations.

SCE&G might abandon or continue the Project, to assist counsel in advising SCE&G in light of the regulatory issues created by Westinghouse's bankruptcy." Resp. at 16. SCE&G thus claims the withheld documents responsive to Request 5-26 are subject to the attorney-client privilege.

Although courts have found that "the privilege for communication with attorneys can extend to shield communications to others when the purpose of the communications is to assist the attorney in rendering advice to the client," "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but . . . advice [of another kind], no privilege exists." *Carter v. Cornell Univ.*, 173 F.R.D. 92, 94 (S.D.N.Y. 1997) (internal quotation marks omitted). Moreover, "[t]he party claiming the benefit of the attorney-client privilege has the burden of establishing all the essential elements." *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995).

Where, as here, the documents logged as responsive to Request 5-26 are described as "regarding the viability of the project post WEC-bankruptcy," (*See, e.g.*, Privilege Log entries nos. 80-346), SCE&G has failed to show that the communications were primarily for the purpose of securing legal, as opposed to business, advice. *See Black & Decker*, 219 F.R.D. at 91 ("The record does not support the conclusion that [the agent]'s advice—or the documents at issue—were provided primarily to assist the plaintiff's attorneys in rendering legal advice."). For these reasons, SCE&G has failed to carry its burden to demonstrate that the documents responsive to Request 5-26 are protected by the attorney-client privilege.

At a bare minimum, *in camera* review is appropriate to address whether these documents have been appropriately withheld. Such review need not be the "blanket request" to review all documents listed on the privilege that SCE&G fears. *See* Resp. at 22-23. ORS too is cognizant

of the Commission's time and resources, and if the Commission would rather direct ORS to choose certain documents for the Commission to review *in camera*, ORS will happily comply.

D. SCE&G is relying on documents responsive to 5-26 in other litigation.

SCE&G is likewise wrong that the references they have made to the documents responsive to 5-26 in related federal litigation are mere "opaque references" or general statements about the studies. Instead, SCE&G's filings in the federal litigation highlight the key and fundamental conclusions allegedly supported by the documents responsive to 5-26, including the costs of completion for various scenarios and the timetable for doing so. Why SCE&G insists upon keeping secret under a veil of privilege the very business-related communications, studies and analyses supposedly undergirding its claims in the federal case is dubious.

CONCLUSION

For the reasons set forth above and in ORS's Motion to Sanction and Compel, ORS respectfully requests the Motion be granted.

Respectfully submitted,

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August 16, 2018